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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,

Petitioner,

v.

BYRON GIZONI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

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BRIEF OF AMICUS CURIAE SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Shipbuilders Council of America is a voluntary, nonprofit national trade association comprised of fifty-one member firms, corporations, partnerships, and organizations engaged in shipbuilding, ship repairing, and allied industries in the United States. The Shipbuilders Council was founded in 1920 for the purpose of promoting a sound private shipbuilding and ship repairing industry in the United States, promoting an adequate mobilization potential of privately-owned

shipbuilding, ship repairing and allied industries in times of national emergency, and affording a means of cooperation between government and industry in matters of national concern.

The members of the Shipbuilders Council employ over 120,000 employees in the United States, many thousands of whom hold jobs comparable to the job held by Respondent Gizoni with Southwest Marine, Inc.[1] The shipbuilding and ship repairing industries are vitally interested in the outcome of this action in that it will affect whether shipyard workers performing ship repairs are properly classified as land-based maritime workers entitled to benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA") or as seamen covered by the Jones Act, 46 U.S.C. § 688(a). The industry considers employees engaged in the occupations enumerated in Section 2(3) of the LHWCA, 33 U.S.C. § 902(3),[2] to be land-based employees entitled to compensation under the LHWCA, and not Jones Act seamen. Employers in the industry routinely and voluntarily pay claims filed by their employees under the LHWCA for work-related injuries.

The decision of the Ninth Circuit in the case before the Court greatly complicates the handling of LHWCA claims filed by shipyard workers. That decision makes

[1] Petitioner Southwest Marine, Inc. is a member of the Shipbuilders Council. A complete list of the members of the Shipbuilders Council appears in Appendix A.

[2] These occupations include longshoremen or other persons engaged in longshoring operations, and other harbor workers including shipbuilders, ship repairers, and ship breakers, but do not include members of a crew of a vessel. 33 U.S.C. §§ 902(3), (3)(G).

it virtually impossible for a shipyard to predict accurately whether a worker will be classified as a maritime worker entitled to LHWCA benefits or as a Jones Act seaman. An employer that promptly and voluntarily pays a claim arising out of an injury is now faced with the possibility that it will incur additional liability in a negligence suit filed by the worker. The Ninth Circuit's holding is inconsistent with the interpretation given the Jones Act and the LHWCA by this Court, and it should be overturned.

There is an urgent need to resolve the uncertainty that now exists as to the status of shipyard workers. Until it is resolved, domestic shipyard companies will have to absorb additional and substantial risk management costs to protect themselves from potential dual compensatory awards for injured shipyard workers. This financial concern is real, as in the last ten years, 11 of the 19 shipyard companies used by the Bureau of Labor Statistics to compute wage indices for shipyard employees have ceased operations (*see* Appendix B). Although LHWCA benefits have increased dramatically in recent years, they remain predictable and quantifiable. Jury awards for negligence actions would be anything but predictable, and would impose unmanageable costs on shipyards. If the Ninth Circuit decision is not overturned, shipyard workers would be entitled to an election of remedies or to duplicate remedies, putting additional pressures on an already financially strapped industry.

The Shipbuilders Council stresses the industry's need for a uniform, predictable test for coverage under the LHWCA and the Jones Act. The Shipbuilders Council proposes a test to be employed in determining whether an individual has a sufficient connection with

a vessel to be considered a "seaman" for purposes of the Jones Act. That test, if adopted, would simplify the administration of LHWCA claims and remove virtually all of the uncertainty over whether an individual is properly classified as a seaman under the Jones Act or as a land-based maritime worker covered by the LHWCA.

SUMMARY OF THE ARGUMENT

There are two types of maritime workers—individuals who are assigned to a ship's crew and land-based maritime employees who work on ships while in port. The LHWCA by its terms makes clear that a person cannot be both a land-based maritime worker entitled to LHWCA benefits and a seaman or member of a crew entitled to bring a negligence action under the Jones Act. Those statutes create a pair of mutually exclusive remedies.

Congress has repeatedly expressed its intention that the Jones Act remedy does not apply to land-based maritime workers such as Respondent Gizoni. In enacting the LHWCA and various amendments to it, Congress expressed its intention that land-based maritime workers (such as longshore and harbor workers, ship repairers, shipbuilders, and ship breakers) should be treated in the same manner as other land-based workers covered by workers' compensation statutes. Each time the courts have attempted to expand the Jones Act negligence action to non-seamen, Congress has reacted and limited the seaman's remedy to those persons who are permanently assigned to a ship's crew. Land-based maritime workers do not face the perils of the sea, but face workplace hazards resembling those faced by other land-based workers. The

LHWCA is a workers' compensation law analogous to state workers' compensation laws protecting non-maritime employees. It strikes a balance permitting a maritime employee to receive compensation for a work-related injury even where the employer was not at fault, but it prohibits a separate negligence action against the employer.

The Jones Act should be limited to individuals permanently assigned to a ship's company. The Court has held that there must be an "employment-related connection to a vessel in navigation" for the Jones Act to apply. That connection cannot be met by persons who are assigned incidental repairs on a ship docked or drydocked at a shipyard.

As a matter of law, Gizoni did not have sufficient connection to a vessel in navigation to be considered a Jones Act seaman. He had no employment-related connection to any vessel, but rather was assigned to work on ships coming into his employer's shipyard for repairs. The district court properly granted summary judgment for Southwest Marine. There is no dispute over any issue of material fact and Southwest Marine is entitled to judgment as a matter of law.

Finally, Gizoni should be estopped from even asserting he is a Jones Act seaman. He applied for and accepted benefits from Southwest Marine under the LHWCA, which applies only if an employee is *not* a seaman. The doctrine of equitable estoppel precludes Gizoni from changing that position to seek additional benefits on a tort theory against Southwest Marine.

ARGUMENT

The Court's decision this term in *McDermott International, Inc. v. Wilander*, 111 S. Ct. 807 (1991),

settled a number of previously unsettled issues regarding the scope of coverage of the Jones Act and the Longshore and Harbor Workers' Compensation Act. *Wilander* made clear that a member of a ship's company need not actually aid in the navigation or transportation of the vessel to be a Jones Act seaman. The Court also decreed in *Wilander* that the Jones Act and the LHWCA are mutually exclusive statutory schemes and that the definition of "seaman" under the Jones Act is coextensive with the definition of the exception to the LHWCA for a "master or member of a crew." Finally, the Court clarified that "master or member of a crew" and "seaman" should be defined in terms of the employee's connection to a vessel in navigation, as that connection implements the distinction intended by Congress between land-based and sea-based maritime workers. Thus, the Court held that "[t]he key to seaman status is employment-related connection to a vessel in navigation." 111 S. Ct. at 817.

The *Wilander* case did not require the Court to address the scope of the employment-related connection to a vessel in navigation necessary to confer seaman status on an individual. That issue is raised by the instant case. The Shipbuilders Council submits that Respondent Gizoni did not, as a matter of law, have sufficient connection with a vessel in navigation to be classified as a "seaman" for purposes of the Jones Act.

I

THE STATUTORY CONTEXT OF THE LHWCA MAKES CLEAR THAT INDIVIDUALS IN MARITIME OCCUPATIONS ENUMERATED IN THE LHWCA ARE NOT JONES ACT SEAMEN

The LHWCA distinguishes between two types of maritime workers—longshore and harbor workers on the one hand, and masters and members of a crew of a vessel on the other. The statute recognizes that there are many employees who work "upon the navigable waters of the United States" who are not masters or members of a crew of a vessel. *See* 33 U.S.C. § 902(4).

The LHWCA applies to employees who build, repair, load, or unload vessels but who are not assigned to a vessel's crew. The definitional sections of the LHWCA make clear that a person cannot be treated both as a longshore or harbor worker and as a member of a crew of a vessel. As a matter of law, an employee in an occupation enumerated in the LHWCA is not a seaman under the Jones Act.

"Employer" is defined in Section 2(4) as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 902(4). An "employee" under the LHWCA is any person engaged in maritime employment *other than* a master or member of a crew of a vessel. Section 2(3) of the LHWCA provides as follows:

> "The term 'employee' means *any person* engaged in maritime employment, including any longshoreman . . . and any harbor-worker, but such term does not include . . . a master or member of a crew of any vessel."

33 U.S.C. §§ 902(3), (3)(G) (emphasis added).

The question presented to the Court is whether a person can be both a longshore or other harbor worker covered by the LHWCA and a Jones Act seaman. The LHWCA rejects such a dual status. The Court has held that the Jones Act and the LHWCA are mutually exclusive. *Wilander*, 111 S. Ct. at 817. A maritime worker is an "employee" covered by the LHWCA only if he or she is not a master or member of a crew of a vessel. If a worker is a master or member of a crew, he or she is not a land-based maritime employee entitled to LHWCA benefits. An individual can thus be either a harbor worker or a member of a ship's crew, but cannot be both. Land-based longshore and harbor workers (including ship repairers, shipbuilders, and ship-breakers) are not seamen covered by the Jones Act.[3]

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[3] The Shipbuilders Council suggests that Gizoni's argument can be analyzed algebraicly. The LHWCA's definition of employee can be diagrammed as follows: A = B but not C, where A represents the term "employee," B represents longshore and harbor workers, and C represents the master or member of a crew of a vessel. In algebraic terms, where A equals B and A does not equal C, then B does not equal C. Persons who fall within B (occupations specifically enumerated in the LHWCA) thus cannot also be C (members of a crew of a vessel). This algebraic formula is consistent with the Court's holding in *Wilander* that the Jones Act and the LHWCA establish mutually exclusive remedies. 111 S. Ct. at 817.

The Shipbuilders Council does not understand how shipyard workers such as Gizoni could be classified as anything but land-based maritime workers covered by the LHWCA, particularly given the nature of the work they were hired to perform. Shipyards do not hire those workers to sail the seas, and they do not assign them to ships. Shipyards hire those workers to repair and build ships in port. The plain language of the two statutes leaves room for no other conclusion.

II

CONGRESS HAS CONSISTENTLY REFUSED TO EXTEND JONES ACT REMEDIES TO LAND-BASED MARITIME WORKERS WHO BUILD AND REPAIR SHIPS IN THE SERVICE OF THEIR LAND-BASED EMPLOYERS

In numerous legislative pronouncements refining the Jones Act and the LHWCA, Congress has repeatedly expressed its intention that workers such as Gizoni are land-based maritime workers entitled to benefits under the LHWCA for injuries sustained on the job, and not seamen who may bring a Jones Act negligence action against their employer.

Under the general maritime laws of the 19th century, a vessel (and its owners) owed certain duties to a seaman falling sick or becoming injured during a voyage. Those duties included the maintenance and cure of the seaman for the duration of the voyage as well as strict liability for the ship's unseaworthiness, but did not include liability in tort through a maritime negligence action. *See The OSCEOLA*, 189 U.S. 158 (1903). In 1920, Congress overturned that maritime principle by enacting an amendment to the

Merchant Marine Act establishing a negligence remedy for "[a]ny seaman who shall suffer personal injury in the course of his employment." 46 U.S.C. § 688(a). That amendment is part of the Jones Act.

Congress did not define the term "seaman," and the result has been substantial uncertainty over the scope of the Jones Act. This Court first wrestled with the definition of seaman in 1926, and Congress promptly registered its disagreement with the Court's reading. In *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926), the Court interpreted the term to include "stevedores employed in maritime work on navigable waters." *Id.* at 52. The injured employee in *Haverty* was a land-based longshoreman injured while stowing freight in the cargo hold of a docked vessel. At that time, the LHWCA had not been enacted, and a different ruling would have deprived the injured worker of a remedy.

Shortly after the *Haverty* decision, Congress passed the LHWCA in 1927, and thereby created a general employers' liability statute similar to state workers' compensation laws. The LHWCA provided a statutory remedy—regardless of fault—to all maritime workers *other than* the "master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). In return for permitting maritime workers to receive compensation without regard to their employer's negligence, Congress declared that the compensation provided under the LHWCA shall be exclusive and in place of all other liability of the employer on account of an employee's injury or death. 33 U.S.C. § 905(a).

Some twenty years later, this Court extended general maritime law principles to land-based employees performing work on a vessel in port. In *Seas Shipping*

Co. v. Sieracki, 328 U.S. 85 (1946), the Court held that although a land-based maritime worker could not bring a Jones Act negligence action against his shipyard employer for injuries sustained, he could assert the traditional maritime remedy of unseaworthiness against a vessel owner if the worker "was doing seaman's work and incurring a seaman's hazard." 328 U.S. at 99. After *Sieracki*, that remedy was equally available to land-based employees working on docked vessels and to sea-based employees injured in the midst of an oceanic voyage. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 413 (1953).

Congress again rejected the Court's reading. In its place, Congress created a distinction between maritime workers who toil at sea and land-locked maritime laborers who are not exposed to the sea's perils. In 1972, Congress amended the LHWCA to clarify that land-based workers temporarily exposed to the hazards of the sea do not have the seaman's remedy for a ship's unseaworthiness. But those workers were not left without a remedy. First, they were still entitled to compensation from their employers under the LHWCA without regard to fault. Second, in place of an action for unseaworthiness, Congress added Section 5(b) to the LHWCA, which created a negligence cause of action against a vessel owner in favor of maritime workers *other than* crew members injured through a vessel's negligence. 33 U.S.C. § 905(b). The legislative history of that amendment illustrates Congress' intent to draw a distinction between land-based and sea-based maritime workers:

> In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen

> from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

S. Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972).

In some cases, however, a shipyard worker's employer is also the vessel's owner. The question therefore arose whether, in such cases, an injured shipyard worker could bring a negligence action against the employer under Section 5(b) or whether the worker could recover compensation without regard to fault under Section 5(a). Once again the Court granted a seaman's remedy to land-based workers, and once again Congress stepped in. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 528 (1983), the Court held that where a shipyard employer was also a vessel owner, an exception to the exclusive liability provision of the LHWCA was created permitting an injured employee to bring an action for negligence against the employer under Section 5(b).

Congress moved quickly to overturn *Pfeifer* to clarify that the statutory remedy under the LHWCA is the only remedy for shipyard workers against their employer for injuries arising out of the course of their work, *regardless of whether that work is performed on land or on a ship being repaired*. In 1984, Section 5(b) was amended to provide that the cause of action created by that section is not available where the shipyard worker is injured through the negligence of

a vessel owned by his or her employer. Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1639, 1641. In enacting that amendment, Congress again articulated its intent that longshore and harbor workers be limited to the remedies established by the LHWCA even if they perform some of their work aboard vessels.[4]

III

SEAMAN STATUS SHOULD REQUIRE A DEFINITE AND PERMANENT CONNECTION TO A VESSEL IN NAVIGATION

As discussed in Part I, there are many employees who labor upon the navigable waters of the United States who are not Jones Act seamen. In *Wilander*, the Court held that an individual must have an "employment-related connection to a vessel in navigation" to be considered a seaman. 111 S. Ct. at 817. The Court said that a necessary element of an "employment-related connection" with a vessel is that a seaman perform the work of the vessel. *Id.* An employee who does not "contribute to the function of the vessel or to the accomplishment of its mission" is not a seaman. *See id.*

The Court has not yet been called upon to address directly the extent of connection to a vessel in navigation required to confer on an employee the status

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[4] This result is perfectly analogous to the result in *Johansen v. United States*, 343 U.S. 427 (1952), where the Court held that a federal government employee has no negligence cause of action for injuries sustained on a government-owned vessel. The worker's exclusive remedy is under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101 *et seq.* The remedy provided under FECA is a typical workers' compensation remedy.

of seaman, but it has commented favorably on lower court decisions requiring a "definite and permanent connection" with a vessel. The Shipbuilders Council submits that the Court should now affirmatively impose such a requirement.

The "aid in navigation" requirement, which was eliminated by the *Wilander* decision, was the only element of the test of seaman status as to which there was any dispute in the lower courts. Led by the Fifth Circuit, the Courts of Appeals have consistently applied, as part of the test of seaman status, a requirement that the employee be more or less permanently assigned to a vessel in navigation. *E.g., Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243-44 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984); *Garcia v. Queen, Ltd.*, 487 F.2d 625, 628 n.6 (5th Cir. 1973); *Cox v. Otis Engineering Corp.*, 474 F.2d 613, 613 (5th Cir. 1973); *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971); *Bodden v. Coordinated Caribbean Transport, Inc.*, 369 F.2d 273, 274 (5th Cir. 1966); *McKie v. Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953); *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941); *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (5th Cir. 1938).

In *Maryland Casualty Co. v. Lawson*, quoted approvingly by the Court in *Wilander* (111 S. Ct. at 817), the Fifth Circuit stated:

> There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in an emergency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. . . . Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her.

94 F.2d at 192.

This Court has never called into question the permanency element of the test of seaman status. In *Wilander*, the jury had found that the employee satisfied the permanency element imposed by the Fifth Circuit. This Court did not disturb that finding or imply that the permanency requirement was in any way improper. Indeed, the Court quoted with approval from the *Lawson* decision, which first imposed the requirement of a definite and permanent connection to a vessel.

The permanency element is consistent with the realities of life as a seaman. As the Court recognized in *Wilander*, sea-based maritime workers owe their allegiance to a vessel, not solely to a land-based employer. 111 S. Ct. at 813. They suffer the "perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* at 817. As Justice Stone pointed out in his dissent in *Seas Shipping Co. v. Sieracki*, traditional seamen's remedies have been "universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected." 328 U.S. at 104 (quoted in *Wilander*, 111 S. Ct. at 817).

Justice Stone quoted from Justice Story in *Reed v. Canfield*, 20 F. Cas. 426, 428 (C.C.D. Mass. 1832):

> Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea-service, which do not belong to home pursuits.

Seas Shipping Co. v. Sieracki, 328 U.S. at 105 (Stone, C.J., dissenting).

The labors of a seaman stand in stark contrast to the life of a shipyard worker performing the duties enumerated in Section 2(3) of the LHWCA. Longshore workers, harbor workers, ship repairers, and other occupations enumerated in Section 2(3) of the LHWCA do not endure the rigors and travails of a seaman. Those workers live on land, are not assigned as part of the permanent company of a vessel, perform their work from a land-based shipyard at the direction of a land-based foreman, are not expected to serve on the vessel during long voyages, and do not answer to the master of a vessel. *See Lawson v. Maryland Casualty Co.*, 94 F.2d 193, 194 (5th Cir. 1938).

Factors Indicating Permanency

A number of factors may be relevant to the determination of whether an employee has a permanent

connection to a vessel in navigation. Relevant factors include, but are not limited to, those identified in *Lawson*: under whose authority the employee serves; whether the employee looks to the vessel for wages; whether the employee has a duty to protect the vessel in an emergency. *Maryland Casualty Co. v. Lawson*, 94 F.2d at 192.

While those factors are relevant, the Shipbuilders Council submits that no fact is more highly probative than the question of where the worker normally sleeps. A seaman who is part of a vessel's permanent company will normally sleep on the ship. Land-based maritime workers normally sleep at their permanent land-based homes, where they go when the working day is over. While this test may seem somewhat simplistic at first blush, the *amicus* suggests that it would lend substantial certainty and predictability to the determination of seaman status that the Ninth Circuit has rendered unpredictable. That test would be reinforced by examining whether the maritime worker was hired to work on a shipyard or to sail the seas. Applying a pragmatic analysis to the determination of whether an employee has a permanent connection to a vessel would also expedite the payment of LHWCA benefits to land-based maritime workers injured on the job.

IV

GIZONI DID NOT HAVE A SUFFICIENT CONNECTION TO A VESSEL IN NAVIGATION TO BE CONSIDERED A JONES ACT SEAMAN

Southwest Marine operates a shipbuilding and ship repair facility where, *inter alia*, it provides ship repair services to ocean-going vessels owned by the United

States government and commercial customers. The work performed by Southwest Marine is not atypical of ship repair work performed by other members of the Shipbuilders Council. Ships are sometimes drydocked and placed on huge supports to effect repairs. On other occasions, ships may remain afloat at the dock during repairs. Employees of the shipyard (including shipbuilders, ship repairers, ship-breakers, and other occupations enumerated in Section 2(3) of the LHWCA) perform repairs from various locations on board, underneath, or alongside the vessel. When in drydock or moored to a shipyard dock, a vessel itself becomes a work platform for the land-based maritime workers to perform maintenance and repairs to the vessel. Those workers do not become seaman simply because their job assignment calls for them to be working on board a vessel on a particular day.

Shipyards use a variety of structures as work platforms from which workers perform repairs. The floating platform on which Gizoni was injured was essentially an extension of the Southwest Marine drydock. It was moored to the drydock and to the stern of a U.S. Navy vessel in the yard for repair. Like driftwood, a floating work platform has no means of propulsion or guidance and would never be considered to be a vessel capable of independently traversing any body of water and arriving at a pre-determined port of destination. The reality of a shipyard is that a floating work platform is nothing more than a functional work device, just as scaffolding serves as a functional work platform for a land-based carpenter, painter, or mason.

Gizoni was a rigger working under the supervision of Southwest Marine's rigging superintendent. He

loaded equipment, materials, supplies, and vessel components onto and off of vessels repaired at the shipyard. He was never assigned to any vessel and performed work on vessels only in the course of his work for Southwest Marine.

Under those facts, which are undisputed, Gizoni is not a seaman. He has not alleged *any* employment-related connection to a vessel in navigation, much less the definite and permanent connection required by the lower courts. *See Wilander*, 111 S. Ct. at 817.[5] Even if the Court should adopt some lesser standard than the "definite and permanent connection" test proposed by the Shipbuilders Council, Gizoni fails because he was never assigned, even momentarily, to the crew of a ship and he never was engaged to "contribute to the function of [a] vessel or to the accomplishment of its mission." *Id.* at 817. He was a full-time employee of Southwest Marine assigned to repair ships docked or drydocked at his employer's shipyard.

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[5] The Shipbuilders Council rejects any contention that the floating platform on which Gizoni was working was his Jones Act "vessel." That platform is merely a work platform used to effect repairs on floating vessels at Southwest Marine's dock. It does not have any means of propulsion or steering, a raked bow, navigation lights, or crew facilities of any type. Lower courts have found similar floating platforms not to constitute vessels for purposes of the Jones Act. *Ellender v. Kiva Const. & Engineering, Inc.*, 909 F.2d 803, 806-08 (5th Cir. 1990); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292-94 (5th Cir. 1990); *Daniel v. Ergon, Inc.*, 892 F.2d 403, 407-08 (5th Cir. 1990). Nor was Gizoni permanently assigned to the platform. His injury occurred while he happened across the platform in the performance of his work for Southwest Marine.

V

SUMMARY JUDGMENT WAS APPROPRIATE ON GIZONI'S JONES ACT CLAIM

In a lawsuit under the Jones Act, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *McDermott International, Inc. v. Wilander*, 111 S. Ct. at 818. In the case before the Court, the facts reasonably support only the conclusion that Gizoni was a land-based maritime worker and not a seaman.

Seaman status under the Jones Act is a mixed question of law and fact. *Id.* The determination of the proper standard for seaman status is for the Court. *Id.* Once the Court defines the standard, the question on summary judgment becomes whether there is sufficient evidence on both sides of the issue that reasonable persons, applying the proper legal standard, could differ as to whether the employee in question satisfied that standard. If not, summary judgment is mandated.

This is not a case where Gizoni's duties were divided between service as a crewman on a vessel and service in a shipyard. Nor is this a case where there is a factual dispute over the duration of his assignment to a vessel or over the type of work he actually performed. The material facts are undisputed, and under those facts Gizoni cannot reasonably be classified as a seaman. The district court properly entered summary judgment for Southwest Marine.

VI

GIZONI SHOULD BE ESTOPPED FROM ARGUING HE IS A JONES ACT SEAMAN BECAUSE HE CLAIMED AND RECEIVED LHWCA BENEFITS

After his injury, Gizoni filed a formal claim for benefits under the LHWCA and received LHWCA benefits from Southwest Marine. He received $3,239.56 for medical expenses and $12,368.44 in disability benefits. As stated above, the Jones Act and the LHWCA are mutually exclusive remedies. *Wilander*, 111 S. Ct. at 817. A seaman may bring a negligence action against his shipowner employer, but may not recover LHWCA benefits. Conversely, a harbor worker or other land-based maritime employee covered by the LHWCA may receive LHWCA benefits but may not bring a negligence action against his employer.

Gizoni is attempting to take the best of both remedies. He succeeded in causing his employer to pay LHWCA benefits voluntarily on the basis that Gizoni was not a master or member of a crew of a vessel. He cannot now claim he was a member of a crew and thus ineligible for the LHWCA benefits he gladly accepted. The courts have fashioned the doctrine of equitable estoppel (sometimes called judicial estoppel) to prevent such abuses of the judicial system.

Equitable estoppel is a doctrine to be applied "to preclude a party from contradicting testimony or pleadings successfully maintained in a prior action." *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980). *See also* Wright, Miller & Cooper, Federal Practice and Procedure § 4477 (1981); 28 Am. Jur. 2d *Estoppel and Waiver* § 59. A party may invoke

the doctrine if it was an adverse party in the prior proceeding, it acted in reliance on the opponent's position in that proceeding, and it faces possible injury if the opponent is permitted to change that position in a later proceeding. *Konstantinidis v. Chen*, 626 F.2d at 937. Judicial estoppel involves the same principles but does not require privity of the parties, reliance, or injury. *Id.* The object of this doctrine is to prevent parties from taking advantage of the judicial system by changing their testimony or position from one proceeding to the next.

The doctrine of equitable estoppel has been applied to preclude parties from taking inconsistent positions in compensation/tort proceedings such as the case before the Court. *E.g., Roth v. McAllister Brothers, Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) (employer that persuaded a state compensation board to dismiss proceedings on the ground that the claimant was a Jones Act seaman could not change its position as to the nature of the employment in a subsequent action under the Jones Act); *Littleton v. Mardigan*, 458 F.2d 251 (7th Cir. 1972) (plaintiff who recovered compensation benefits could not deny he was an employee in a subsequent action against a co-worker); *Smith v. Montgomery Ward & Co.*, 388 F.2d 291, 292 (6th Cir.), *cert. denied*, 393 U.S. 871 (1968) (claimant who asserted in compensation proceeding that his condition resulted from a work-related accident could not thereafter assert the injury occurred in an altercation with private investigators retained by his employer). *Contra Mike Hooks, Inc. v. Pena*, 313 F.2d 696 (5th Cir. 1963) (court held there was no privity between the parties in the two actions).

Gizoni asserted he was a land-based maritime worker entitled to compensation under the LHWCA. In reliance on that position, Southwest Marine paid Gizoni more than $15,000 in LHWCA benefits. Gizoni now argues that he was not a land-based worker (and thus not entitled to LHWCA benefits), but was instead a Jones Act seaman. The claim should be barred by the doctrine of equitable estoppel.

CONCLUSION

WHEREFORE, the Shipbuilders Council respectfully submits that the decision of the Ninth Circuit should be reversed and that the district court's order granting summary judgment for Southwest Marine should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

The following are members of the Shipbuilders Council of America:

Regular Members

The American Ship Building Company, Tampa Shipyards, Inc.

Atlantic Marine, Inc.

Avondale Industries, Inc.

Bath Iron Works Corporation

Bender Shipbuilding & Repair Company, Inc.

Bethlehem Steel Corporation

Bollinger Machine Shop & Shipyard, Inc.

Edison Chouest Offshore, North American Shipbuilding, Inc.

General Dynamics Corporation

General Ship Corporation

Halter Marine, Inc.

Ingalls Shipbuilding, Inc.

Intermarine U.S.A.

The Jonathan Corporation

Marine Hydraulics International, Inc.

Marinette Marine Corporation

McDermott Corporation

Metro Machine Corporation

National Steel & Shipbuilding Company

Newport News Shipbuilding

Norfolk Shipbuilding & Drydock Corporation
Peterson Builders, Inc.
Robert E. Derecktor of Rhode Island, Inc.
Service Engineering Company
Southwest Marine, Inc.
Textron Marine Systems
Todd Shipyards Corporation

Allied Industry Members

ABB Combustion Engineering System
Bird-Johnson Company
Centrico, Inc.
Fairbanks Morse Engine Division
General Electric Company
Hopeman Brothers, Inc.
IMO Industries, Inc.
Jamestown Metal Marine Sales, Inc.
Jered Brown Brothers, Inc.
Lake Shore, Inc.
SPD Technologies
Sperry Marine, Inc.
Westinghouse Electric Corporation
York International Corporation

Affiliate Members

The Bingham Group
Colton & Company

PacOrd, Inc.
Peterson & Company
Poten & Partners, Inc.

Naval Architect Members

JJH Inc.
John J. McMullen Associates, Inc.
M. Rosenblatt & Son, Inc.

Association Members

New York and New Jersey Dry Dock Association
South Tidewater Association of Ship Repairers, Inc.

APPENDIX B

The following shipyards were used by the Bureau of Labor Statistics in 1980 to compute wage indices for shipyard workers. The shipyards that are highlighted closed in the year indicated.

The American Ship Building Company, Lorain, OH (1983)

Avondale Shipyards, Inc, New Orleans, LA

Bath Iron Works Corporation, Bath, ME

Bethlehem Steel Corporation, Beaumont, TX (1988)

Bethlehem Steel Corporation, San Francisco, CA (1981)

Bethlehem Steel Corporation, Sparrows Point, MD

Dravo Corporation, Neville Island, PA (1984)

FMC Corporation (Gunderson), Portland, OR (1986)

General Dynamics Corporation, Quincy, MA (1986)

General Dynamics Corporation, Electric Boat Division, Groton, CT

Levingston Shipbuilding Corporation, Orange, TX (1982)

Litton/Ingalls Shipbuilding, Inc., Pascagoula, MS

Lockheed Shipbuilding & Construction Co., Seattle, WA (1987)

Maryland Shipbuilding and Drydock Co., Baltimore, MD (1984)

National Steel & Shipbuilding Co., San Diego, CA

Newport News Shipbuilding, Newport News, VA

Todd Shipyards Corporation, San Pedro, CA (1989)

Todd Shipyards Corporation, Seattle, WA

Willamette Iron and Steel Corporation, Portland, OR (1981)